Davis Wright Tremaine LLP

21st Floor
1251 Avenue of the Americas
New York, NY 10020-1104

Lacy H. Koonce, III
212.603.6467 tel
212.489.8340 fax

lancekoonce@dwt.com

November 15, 2016

By ECF
Hon. Peggy Kuo
United States District Court
225 Cadman Plaza East
Brooklyn, NY 11201

Re: *TVB Holdings (USA), Inc., et al. v. HTV International Limited,* et al., No. 16-cv-01489 (DLI)(PK), Plaintiffs' Motion to Compel Discovery

Dear Magistrate Judge Kuo:

On behalf of plaintiffs TVB Holdings (USA), Inc., China Central Television, China International Communications Co., Ltd. and DISH Network L.L.C. ("Plaintiffs"), we write pursuant to Fed. R. Civ. P. 33, 34 and 37, Local Civil Rules 37.1 and 37.3 and Your Honor's Individual Practice Rule V(A)(1) to request that sanctions be imposed on defendant HTV International Limited ("HTVI") by reason of HTVI's persistent refusal to comply with Your Honor's September 14, 2016 discovery order. Additionally, because HTVI's continuing contumacious conduct is stymying Plaintiffs' legitimate discovery efforts, Plaintiffs request that the discovery deadline in this action be extended by 45 days to January 16, 2016.

On September 14, 2016, this Court held a telephonic conference in connection with Plaintiffs' motion to compel HTVI to fully comply with outstanding discovery requests, including document requests that had been pending since June 3, 2016. On September 15, 2016, the Court entered a Minute Order [Doc. No. 36] granting Plaintiffs' motion, stating in relevant part:

> The Court heard the parties on Plaintiffs' Motion to Compel [33], and granted the motion. Defendants' counsel were reminded that sanctions may be imposed if Defendants do not meet their discovery obligations, particularly with respect to ESI. The parties were ordered to meet and confer regarding ESI, and Defendants are to give Plaintiffs a definite deadline by which production will be complete. Defendants are also to amend their interrogatory responses so that they either answer the questions asked or give information regarding specific documents. Given that Plaintiffs have agreed to depose Defendants in Hong Kong, if second depositions by Plaintiffs are necessitated by insufficient production by Defendants, the Court will consider shifting the cost of the second depositions to the Defendants.

Now, after nearly seven weeks of pressing HTVI to comply with Your Honor's discovery order in advance of a Rule 30(b)(6) deposition in Hong Kong, Plaintiffs are forced to return to the Court

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because, although HTVI has produced some additional documents, review of those records clearly demonstrates a deliberate effort by HTVI to evade the discovery order and to selectively produce only some documents, while improperly concealing the existence of other responsive documents. This obstructionist behavior was clearly revealed by the revelation on November 7 of a key category of sales documents that HTVI only admitted to "overlooking" once Plaintiffs obtained third-party discovery of a payment processor that independently revealed the existence of these sales. Attached as Exhibit A is a series of letters and emails between counsel detailing this recent revelation.

Separately, we also have learned through discovery that HTVI sells at least one other set-top device—branded as the "A1" device—that has been described as the next generation of h.TV devices, and that offers the same or similar infringing apps as the original h.TV versions. Yet in response to a question about reference to the "A1" device in a single document produced by HTVI, counsel for HTVI stated in writing that the A1 device is not marketed in the United States. Again, third-party discovery reveals that to be a false statement. Plaintiffs' document requests clearly require HTVI to produce documents evidencing any device, regardless of branding, that facilitates the infringement of Plaintiffs' copyrights in their television programming; and HTVI has attempted to evade discovery of any documents related to the A1 device as well, only to be caught in a lie.

Although these particular issues are significant, they are far from the only problem with HTVI's production. Plaintiffs worked with HTVI's counsel to agree upon ESI search terms,[1] as instructed by the Court, but HTVI appears to have interpreted the search terms as a license to do limited searches of its electronic files and then do nothing to further identify and produce responsive documents. For instance, as detailed in our letter of November 11 to HTVI's counsel (*see* Exhibit A), HTVI continues to refuse to produce any materials regarding app developers, whether for the infringing apps or any apps, even though it has provided email addresses for two app developers in its interrogatory response (it must at least have those email addresses in some internal document or it could not have provided that information), and despite the fact that it claims to have altered its app intake system to require registration as of six months ago. HTVI has failed to produce any internal communications whatsoever, now claiming that its employees only communicate through personal email and messaging accounts (which, if true, would still be subject to discovery). HTVI has failed to produce complete versions of spreadsheets and other documents where the ESI search turned up fragments or screen shots of such documents. HTVI has failed to produce any back-up documents for most of the sales documents it has produced, other than a small set of purchase orders and invoices that are unverifiable against any other information. HTVI has failed to produce technical documents other than actual source code for its device, apparently taking the position that its devices and the network upon which they operate magically spring into being with no documentation or records. The list goes on. To date, the explanations from HTVI's counsel regarding why HTVI's document production for each category is deficient have been singularly unpersuasive, and in fact defy logic. *See* Exhibit A.

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[1] Notably, this process also has taken far too long. At the September 14 court conference, Your Honor told the parties to meet and confer on ESI, but rather than immediately set up a meet and confer, a full week later HTVI's counsel instead provided proposed search terms by letter. We responded within 48 hours and proposed additional terms given the patent insufficiency of HTVI's proposed searches. On September 27, again by letter, HTVI objected to one-third of the search terms, and demanded that plaintiffs' counsel contact HTVI's counsel to resolve the dispute, without offering any concrete solutions to the allegedly overbroad terms. On September 30, Plaintiffs' counsel responded pointing out inconsistencies in the September 27 letter, asking whether document production was complete, and making ourselves available to discuss search terms. A week later, HTVI's counsel again wrote demanding that Plaintiffs' counsel call about search terms, indicating that production was not complete because of the failure to have a meet and confer on search terms, and saying that discovery efforts would have to be delayed until after October 8 because of a Chinese holiday. Finally, on October 19, HTVI produced additional documents, stating that its production was "now substantially complete." Much of the material produced was in Chinese, and has required translation. Nevertheless, we wrote to HTVI's counsel on November 3 and set forth a significant number of serious deficiencies in the production. HTVI's counsel responded on November 4, but then followed up on November 7 disclosing the entire category of "overlooked" sales records.

As noted, our November 11 letter to HTVI sets forth the most egregious aspects of HTVI's failure to cooperate in discovery, but these are by no means the only categories where it appears there may be other responsive documents that have not been produced. HTVI's counsel has urged us to go forward with the Hong Kong deposition and just ask his client about any deficiencies. Given the extent of those deficiencies, and the need to use an interpreter, we are very concerned that deposing the HTVI witness will not get to the root of the problem here, will waste time and money, and will require the Court to order a follow-up deposition. We therefore request that the Court sanction HTVI for its failure to meaningfully participate in document discovery, by imposing a sanction of $3,000 per day[2] until HTVI produces the requested or provides to the Court plausible reasons why it cannot do so.

In addition, by reason of HTVI's persistent refusal to turn over relevant discovery, we respectfully request that the discovery deadline be extended by 45 days from December 2, 2016 to January 16, 2017, so that Plaintiffs' are not prejudiced by HTVI's discovery misconduct, as detailed at length above. We attach a proposed, revised Scheduling Order that extends all pending deadlines by 45 additional days as well. We would note that already pending before the Court is a request from Plaintiffs to extend the parties' time to join additional parties and amend the pleadings by 30 days. The proposed Scheduling Order assumes that the motion will be granted and that the deadline for amending the pleadings will be November 30, 2016. Counsel for HTVI has consented to this request for an extension, and to the proposed Scheduling Order.

Thank you for your consideration of this request.

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[2] In its interrogatory responses, HTVI says it sold approximately 38,600 units of the h.TV device in the U.S. from December 2014-August 2016. While we believe this to be significantly understated, even taking this representation at face value, HTVI sells approximately 1750 units per month, or 60 units per calendar day. It sells devices at wholesale for around $60 to$120 and at retail for around $300. Its revenue figures (which we also believe are significantly understated) show revenues of approximately $105,000 per month, or around $3500 per day. Using either metric, a $3,000/day sanction is reasonable in light of the revenues HTVI derives each day from its U.S. sales.

Respectfully Submitted,

Davis Wright Tremaine LLP

Lacy H. Koonce, III

cc: Tim Wang, Esq. (via ECF); Hao Ni, Esq. (via ECF); John T. McNamara, Esq. (via ECF); Neal G. Massand, Esq. (via ECF)